

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

IN RE:

JACQUELINE HILL,

CASE NO.: 15-40593-KKS

CHAPTER: 13

Debtor.

/

ORDER DENYING *DEBTOR'S MOTION TO COMPEL CHAPTER 13*
TRUSTEE TO CONFORM MORTGAGE DISTRIBUTIONS TO
DEBTOR'S PLAN AND MAKE THE DEBTOR WHOLE FOR ANY
COSTS FROM ERROR IN DISTRIBUTIONS (DOC. 142)

Debtor, Jacqueline Hill, confirmed a Chapter 13 plan and, with some difficulties, made all required plan payments to the Chapter 13 Trustee. Once Debtor made her final plan payment, the Chapter 13 Trustee filed her final report and the Court closed the case. Debtor then found herself defending a foreclosure on her home.

Debtor reopened her case; she claims that 1) her mortgage holder misapplied the payments made to it by the Chapter 13 Trustee, and 2) that the confirmed plan required the Chapter 13 Trustee to make equal monthly payments to the mortgagee. Rather than taking the mortgagee to task, Debtor seeks an order requiring the Trustee to “fix” the problem by paying

additional money to the mortgagee. Debtor cites no relevant authority in support of her motion and failed to avail herself of appropriate remedies provided by the Bankruptcy Code and Rules. For those reasons the relief Debtor seeks must be denied.

BACKGROUND

THIS CASE is before the Court on *Debtor's Motion to Compel Chapter 13 Trustee to Conform Mortgage Distributions to Debtor's Plan and Make the Debtor whole for any Costs from Error in Distributions* ("Motion to Compel," Doc. 142) and all papers filed in response.¹ The Court held a hearing on June 25, 2020 at which Leigh Hart, the Chapter 13 Trustee, William Miller, counsel for the Chapter 13 Trustee, and Allen Turnage, counsel for Debtor, appeared.

Debtor filed her Chapter 13 petition and Chapter 13 plan on December 10, 2015; the Court confirmed Debtor's *Fourth Amended Chapter 13 Plan* on February 13, 2017.² On September 14, 2017, the Court approved a permanent mortgage modification agreement ("MMM") between Debtor

¹ *Chapter 13 Trustee's Objection to Debtor's Motion to Compel Chapter 13 Trustee to Conform Distributions to Debtor's Plan and Make the Debtor Whole for Any Costs from Errors in Distribution*, Doc. 146; *Debtor's Response to Trustee's Response*, Doc. 150; *Chapter 13 Trustee's Notice of Filing State Court Pleadings*, Doc. 157; and *Chapter 13 Trustee's Notice of Filing Additional State Court Pleadings (Answer and Affirmative Defenses)*, Doc. 158.

² *Voluntary Petition for Individuals Filing for Bankruptcy*, Doc. 1; *Initial Chapter 13 Plan*, Doc. 2; and *Order Confirming Plan and Order to Debtor(s)*, Doc. 68.

and U.S. Bank Trust, N.A., as Trustee for Lsf9 Master Participation Trust (“Lender”).³

Debtor struggled throughout her case to make her plan payments. When the MMM was approved, Debtor was already in arrears on her plan payments so the Chapter 13 Trustee filed her first motion to dismiss.⁴ To resolve the first motion to dismiss, Debtor consented to a “strict compliance” order which required her to cure her delinquency and pay all future regular monthly payments on time.⁵

Despite the “strict compliance” order, Debtor failed to cure the delinquency. On January 30, 2018 the Trustee filed her second motion to dismiss.⁶ In her initial response to the second motion to dismiss, Debtor did not deny that she was in arrears on her plan payments.⁷ Rather, she made six (6) payments of \$500 each to the Trustee on February 2, 2018, and then

³ *Order Granting Motion to Approve Loan Modification with Lender*, Doc. 76.

⁴ According to the Trustee’s first motion to dismiss, as of September 21, 2017, Debtor was in arrears under her plan by \$3,000.00, which equated to two (2) plan payments of \$1,500.00 each. *Chapter 13 Trustee’s Motion to Dismiss*, Doc. 78. Debtor’s only response to the Trustee’s Motion to Dismiss was that she would “address the Trustee’s concerns in a timely manner.” *Debtor’s Response to Chapter 13 Trustee’s Motion to Dismiss*, Doc. 79.

⁵ *Stipulated Order on Chapter 13 Trustee’s Motion to Dismiss*, Doc. 83, entered on October 16, 2017.

⁶ *Chapter 13 Trustee’s Motion to Dismiss*, Doc. 87.

⁷ *Debtor’s Response to Chapter 13 Trustee’s Motion to Dismiss*, Doc. 88.

on February 12, 2018 filed an amended response stating that she was current on her plan payments, which by that time she was.⁸

In May of 2018, Debtor again became delinquent on her Chapter 13 plan payments, causing the Trustee to file her third motion to dismiss.⁹ This time, Debtor responded by averring that she would cure the payment default “in a timely manner.”¹⁰ Apparently that did not occur. The hearing on the Trustee’s third motion to dismiss was held, as scheduled, on August 23, 2018 and that motion was granted with no opposition.¹¹

Less than two weeks later, on September 5, 2018, Debtor filed a motion to reconsider the dismissal of her case, declaring that she had “cured the default” and that her payments were now current.¹² The Trustee relented yet again and agreed to an order granting that motion.¹³ After the case was reinstated, Debtor managed to make the remainder of her plan payments. On February 26, 2019, the Trustee filed a *Notice of Intention to Close Case with Preliminary Final Report and Account*.¹⁴

⁸ *Amended Debtor’s Response to Chapter 13 Trustee’s Motion to Dismiss*, Doc. 89.

⁹ *Chapter 13 Trustee’s Motion to Dismiss*, Doc. 92.

¹⁰ *Debtor’s Objection to Chapter 13 Trustee’s Motion to Dismiss*, Doc. 94.

¹¹ *Hearing Proceeding Memo*, Doc. 97; *Order Granting Chapter 13 Trustee’s Motion to Dismiss*, Doc. 98.

¹² *Debtor’s Motion to Reconsider Order Dismissing Chapter 13 Bankruptcy Case*, Doc. 100.

¹³ *Chapter 13 Trustee’s Consent to Debtor(s)’ Motion to Reconsider Order Dismissing Chapter 13 Bankruptcy Case*, Doc. 105; and *Order Granting Debtor’s Motion to Reconsider Dismissal of Her Chapter 13 Bankruptcy Case*, Doc. 108.

¹⁴ Doc. 112.

In March of 2019, a new attorney appeared for Lender and Lender transferred its claim to a third party.¹⁵ No party objected to the Trustee's notice of intention to close case, the Trustee's *Preliminary Final Report and Account* filed on April 25, 2019, or the *Chapter 13 Standing Trustee's Final Report and Account*, filed July 9, 2019.¹⁶ In June of 2019 Debtor received her discharge and in July of 2019, the Clerk closed the case.¹⁷ Debtor filed a motion to reopen this case which the Court granted in January of 2020.¹⁸

Attachments to the Motion to Compel show that Lender claims Debtor is in default by having failed to make "the payment due for July 1, 2018" and that "all subsequent payments have not been made."¹⁹ It is difficult to ascertain whether this allegation is true because the facts of record are in conflict. According to the Trustee, Debtor cured her final arrearage under the plan on September 11, 2018.²⁰ That being the case, the Trustee could not have disbursed the last payments due under the plan until after that date. Debtor's confirmed plan proposed to pay Lender \$956.36 per month

¹⁵ *Request for Service of Notices*, Doc. 114; and *Transfer of Claim Other than for Security*, Doc. 116.

¹⁶ Docs. 112, 120 & 127.

¹⁷ *Order of Discharge*, Doc. 125; *Clerk's Notice of Closing, Discharging Trustee, and Cancelling Bond*, Doc. 128.

¹⁸ *Debtor's Motion to Reopen Chapter 13 Case to Determine Status of Mortgage Debt*, Doc. 130; and *Order Granting Debtor's Motion to Reopen Chapter 13 Case*, Doc. 132.

¹⁹ Doc. 142-4, p. 5.

²⁰ Doc. 146, ¶11.

for thirty-six (36) months beginning “with the payment due on *1 February, 2017 . . .*,”²¹ but the permanent loan modification approved on September 14, 2017 specifies that the payments of \$956.36 would begin on *July 1, 2017*.²²

Regardless of whether Debtor is in default to Lender, Lender’s motion to approve the permanent loan modification did not demand or require the Trustee to make equal monthly payments. Instead, that motion states, in pertinent part:

Payment(s) made to the Chapter 13 Trustee constitute timely payments made to Creditor, [*sic*] during the remainder of the Plan and the Debtor will continue making the modified mortgage payments after the Plan has completed. The Trustee shall disburse payments as soon as practicable.²³

In her motion to reopen this case, Debtor requested that the Court allow her to file an “appropriate motion to determine the status of her mortgage payments as of the date of her discharge”²⁴ But Debtor did not file such a motion; instead, she filed a motion to compel the Trustee to

²¹ Doc. 66; and *Order Confirming Plan and Order to Debtor(s)*, Doc. 68.

²² *Motion to Approve Loan Modification Agreement*, Doc. 74; and *Order Granting Motion to Approve Loan Modification with Lender*, Doc. 76 (emphasis added).

²³ Doc. 74, ¶¶ 3, 4.

²⁴ Doc. 130, p. 2.

file a motion to determine the status of her mortgage payments.²⁵ After the Court denied that motion,²⁶ Debtor filed the instant Motion to Compel in which she seeks, *inter alia*, injunctive relief against the Chapter 13 Trustee.

DISCUSSION

Debtor asserts that the Chapter 13 Trustee was required to conform her distributions to the underlying mortgage documents. In support, Debtor relies on two cases, *In re Bateson*²⁷ and *United Student Aid Funds, Inc. v. Espinosa*,²⁸ neither of which are germane.

In *Bateson*, the question before the court was whether funds held by a Chapter 13 trustee in a case dismissed post-confirmation should be returned to the debtor or distributed to creditors.²⁹ The court in *Bateson* found that when a Chapter 13 case is dismissed, funds paid by a debtor to a Chapter 13 trustee and not yet disbursed must be returned to the debtor.³⁰ Nothing in *Bateson* touched on whether the Chapter 13 trustee

²⁵ *Debtor's Motion to Compel Chapter 13 Trustee to File Motion to Determine the Status of her Mortgage Payments*, Doc. 134; and *Debtor's Amendment to Motion to Compel Chapter 13 Trustee to File Motion to Determine the Status of her Mortgage Payments*, Doc. 138.

²⁶ *Order Denying Debtor's Motion to Compel Chapter 13 Trustee to File Motion to Determine Status of Debtor's Mortgage Payments (Doc. 134) and Debtor's Amendment to Motion to Compel Chapter 13 Trustee to File Motion to Determine the Status of her Mortgage Payments*, Doc. 144.

²⁷ *In re Bateson*, 551 B.R. 807 (Bankr. E.D. Mich. 2016).

²⁸ *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

²⁹ *In re Bateson*, 551 B.R. 807, 809 (Bankr. E.D. Mich. 2016).

³⁰ *Id.* at 813.

was required to make monthly payments to a mortgage loan creditor in accordance with loan documents.

In *Espinosa*, the United States Supreme Court affirmed the validity of a Chapter 13 confirmation order that required the debtor to pay only the principal due on student loans; the result was that the interest and other loan charges would be discharged even though the debtor had not sought a hardship discharge under 11 U.S.C. § 523(a)(8).³¹ *Espinosa* did not entail and the Supreme Court did not address what Debtor urges here: that the Chapter 13 Trustee was legally required to make equal monthly mortgage payments to a creditor.

Debtor has failed to cite, and the Court has been unable to locate, a single case that supports Debtor's argument. To the contrary, case law and other authorities tout the benefits of Chapter 13 trustees making mortgage loan distributions, in part because of the overall superiority of their record keeping:

The standing Chapter 13 trustee typically makes disbursements on the same day once each month. The mortgage holder will know within a few days of that day whether the debtor made a full payment to enable the trustee to make full payments to creditors. When all payments are made through the trustee, the mortgage holder can readily determine from the Chapter 13 trustee whether the debtor is meeting all obligations

³¹ *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 275 (2010).

under the plan. If the continuing mortgage payment is made through the trustee and if the debtor fails to make full payments, the trustee becomes an ally in the creditor's motion for relief from the stay or motion to dismiss.³²

...

Only the Chapter 13 trustee can be counted on to have a complete and accurate record of everything paid on account of the home mortgage. And the trustee can serve this function only if *all* payments—regular installments and curing default—are made through the trustee. Without the trustee's records, the debtor coming out of a Chapter 13 case too often runs immediately into a mortgage foreclosure notice that is difficult and expensive to defend. Debtor's counsel will inevitably be blamed for the problem. Everybody is better off paying the small price for the competence and stability of the trustee's office.³³

The timing of distributions to mortgagees by Chapter 13 trustees is not a novel issue. Courts faced with this issue have denied creditors relief from the automatic stay, post-petition late charges, and other relief if the only alleged event of default is the timing of the distribution from the Chapter 13 trustee.³⁴

³² Keith M. Lundin, LUNDIN ON CHAPTER 13, § 85.6, at ¶ 20, LundinOnChapter13.com (last visited June 23, 2020).

³³ *Id.* at ¶ 21.

³⁴ See e.g. *In re Lee*, 167 B.R. 417, 426–29 (Bankr. S.D. Miss. 1992), *aff'd sub nom. Green Tree Financial Corporation – Mississippi v. Cowan*, 168 B.R. 319 (S.D. Miss. 1993), *aff'd sub nom. Matter of Payton*, 22 F.3d 1094 (5th Cir. 1994) (“Green Tree’s argument that the Court should hold the Debtors responsible for the manner in which the Trustee disburses funds is wholly unfounded. . . . If Green Tree’s argument were accepted by this Court, then the only way a debtor could comply with the Bankruptcy Code would be to pay any secured creditor protected from modification of its rights under § 1322(b)(2) outside of the plan. Such a result is not mandated by § 1322(b)(2).”); see also *In re Rutenbeck*, 78 B.R. 912, 913 (Bankr. E.D. Wis. 1987) (“Delay in distribution of funds by the chapter 13 trustee following confirmation is not

The mortgage holder in *In re Lee* made the same argument urged by Debtor here: that the Chapter 13 Trustee was mandated to pay the mortgage in accordance with the loan documents.³⁵ The Bankruptcy Court for the Southern District of Mississippi made short shrift of that argument:

Assuming the debtor completes the plan, the creditors will receive the appropriate amount over the life of the plan. . . the Trustee's office disburses between 10,000 and 15,000 checks to creditors each month. It would be extremely burdensome for the Chapter 13 Trustee to review every contract involving a home mortgage, determine the due date, and pay each individual creditor in accordance with its particular contract.³⁶

In this case, the Lender has never sought relief from the automatic stay or other relief in this Court, nor has it contested that the Chapter 13 Trustee made all payments due it under Debtor's confirmed plan. Further, although she does not attempt to challenge the Lender in this Court, as an affirmative defense to Lender's foreclosure complaint Debtor alleged that she made all payments required under her plan and that the Lender apparently misapplied payments made by the Trustee: "It appears that the

uncommon and can be caused for any number of reasons, none of which is the fault of the debtor. A secured creditor will not be given relief from stay, nor any creditor, secured or unsecured, relief under § 1307(c), where the debtor has been making payments to the trustee in accordance with a confirmed plan, and the creditor's sole complaint is that the trustee has been slow in paying out to the creditor."); and Keith M. Lundin, LUNDIN ON CHAPTER 13, § 83.6, at ¶ 27, LundinOnChapter13.com (last visited June 23, 2020).

³⁵ *In re Lee*, 167 B.R. 417, 419 (Bankr. S.D. Miss. 1992), *aff'd sub nom. Green Tree Financial Corporation – Mississippi v. Cowan*, 168 B.R. 319 (S.D. Miss. 1993), *aff'd sub nom. Matter of Payton*, 22 F.3d 1094 (5th Cir. 1994).

³⁶ *Id.* at 428.

Chapter 13 Trustee may have sent multiple month [*sic*] payments to Plaintiff in single disbursement, which it inappropriately applied as principal reductions instead of application to the next payment due.”³⁷

It is unclear why Debtor is attempting for a second time in this case, as her counsel has done unsuccessfully in other cases,³⁸ to hold the Trustee accountable for a creditor’s apparent misapplication of funds. It is equally unclear why Debtor has elected to take no action in this Court against the Lender, even though she raised 11 U.S.C. § 524 as an affirmative defense in the foreclosure action.³⁹

Section 524(i) provides a post-discharge remedy when creditors do not honor the terms of a confirmed plan:

The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of a

³⁷ Doc. 158, p. 5.

³⁸ *In re Heyward*, Case No. 14-40669-KKS, Doc. 104, *Debtor’s Motion to Compel Chapter 13 Trustee to File Motion to Determine the Status of her Mortgage Payments* (Bankr. N.D. Fla. Jan. 17, 2020); *In re Heyward*, Case No. 14-40669-KKS, Doc. 113, *Debtor’s Motion to Compel Chapter 13 Trustee to Conform Mortgage Distributions to Debtor’s Plan and make the Debtor whole for any Costs from Error in Distributions* (Bankr. N.D. Fla. Mar. 3, 2020); and *In re Davis*, Case No. 14-40510-KKS, Doc. 131, *Debtor’s Motion to Compel Chapter 13 Trustee to Conform Mortgage Distributions to Debtor’s Plan and make the Debtor Whole for any Costs from Error in Distributions* (Bankr. N.D. Fla. Mar. 3, 2020).

³⁹ Doc. 158, p. 6.

creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.⁴⁰

A remedy under § 524(i) is available when: “(1) a creditor willfully fails to credit payments received under a valid, confirmed plan that the debtor has not defaulted on, and (2) the debtor suffers material injury as a result of creditor's failings.”⁴¹ In *In re Collins*, the bankruptcy court for the Eastern District of Tennessee stated as to Section 524(i):

Clearly, based upon the wording of § 524(i), a creditor that willfully fails to credit payments received under a confirmed Chapter 13 plan shall, to the extent that failure harms the debtor, be in violation of the discharge injunction. This subsection does not provide a basis for the incorporation of proposed language in a Chapter 13 plan. Instead, it merely provides debtors a potential remedy, post-discharge, if a creditor has failed to honor the terms of a confirmed plan by not properly crediting payments received as required by the plan.⁴²

Here, rather than take the Lender to task via Section 524(i), and contrary to the affirmative defenses she raised against the Lender in the foreclosure, Debtor claims that the Chapter 13 Trustee did not pay in accordance with the confirmed plan. At its core, Debtor's Motion to Compel

⁴⁰ 11 U.S.C. § 524(i) (2020).

⁴¹ *In re Winston*, 416 B.R. 32, 37 (Bankr. N.D.N.Y. 2009) (citing *In re Patton*, No. 08-23038, 2008 WL 5130096, at *2 (Bankr. E.D. Wis. Nov. 19, 2008)).

⁴² *In re Collins*, No. 07-30454, 2007 WL 2116416 at *4 (Bankr. E.D. Tenn. July 19, 2007). In a footnote, the court in *Collins* noted that while legislative history for Section 524(i) is “scarce,” the Senate Report clearly states that “[t]he Committee intends the term ‘willful’ to encompass only deliberate refusals to credit payments under circumstances where it is clear that the creditor is aware of its legally binding responsibility to do so.” *Id.* at *4 n.5 (citing S.REP.NO. 105-253, 105th Cong., 2nd Sess. at *36 (1998)).

argues that the confirmed Chapter 13 plan dictated specifically how the Trustee was to make, and the Lender was to apply, plan payments. Debtor's plan contains no such specific requirement.

Had Debtor attempted to include such language in her plan at the beginning, she likely would not have been successful. Bankruptcy courts have sustained objections to so-called application-of-payments provisions: Chapter 13 plan provisions that attempted to direct, with precision and specificity, how creditors must apply plan payments.⁴³ As one bankruptcy court put it:

The application-of-payments subsections are unnecessary because Rule 3002.1 provides for judicial resolution of any dispute about the debtor's home mortgage payments, including whether the lender properly applied payments.⁴⁴

Debtor ignored the fact that Rule 3002.1(f) permits her to file a Notice of Final Cure Payment if the Trustee does not. Instead, Debtor filed a motion seeking to compel the Trustee to file a "Motion to Determine the Status of Debtor's Mortgage Payments," proclaiming, incorrectly, that she

⁴³ *In re Winston*, 416 B.R. 32 (Bankr. N.D.N.Y. 2009).

⁴⁴ *In re Parkman*, 589 B.R. 567, 578 (Bankr. S.D. Miss. 2018) (citing Symposium, *Consumer Bankruptcy Panel: Recent Developments in Bankruptcy Regulation: Mortgage Servicing Rules, the FDCA, and the CFPB*, 32 Emory Bankr. Dev. J. 303, 330 (2016) ("Bankruptcy Rule 3002.1 [was] specifically designed to address this problem [of payment application and curing a mortgage arrearage].")).

had “no other mechanism available to afford her relief,” and avowing that “neither the Debtor nor her counsel should be required to rectify this problem [the creditor’s misapplication of payments]. Rather, the court should order the Chapter 13 Trustee to file an appropriate motion in order to bring relief to the Debtor.”⁴⁵

The premise for the current Motion to Compel—that a Chapter 13 panel trustee must pay secured creditors monthly in accordance with their mortgage documents—is untenable. Debtor could and should have used Rule 3002.1 to ascertain whether the Lender properly applied the payments made to it by the Chapter 13 Trustee.

Rule 3002.1 is a potent and multi-faceted tool for debtors, debtors’ attorneys, chapter 13 trustees and bankruptcy courts. If used effectively, it ensures that chapter 13 debtors receive accurate post-petition mortgage statements, reduces the likelihood that chapter 13 debtors will be charged improper or unwarranted mortgage fees, and prevents conduct that could otherwise jeopardize the fresh starts earned by chapter 13 debtors.⁴⁶

If the Lender has truly misapplied her plan payments, Debtor could have, should have, and still may avail herself of the remedy Congress

⁴⁵ *Debtor’s Motion to Compel Chapter 13 Trustee to File Motion to Determine the Status of her Mortgage Payments*, Doc. 134.

⁴⁶ Hon. Colleen A. Brown & Ha Young Chung, *The Not-So-New Rule 3002.1: It Only Works if We Use It*, Am. Bankr. Inst. J., January 2017, at 18, 56.

provided in 11 U.S.C. § 524(i). But she is not entitled to the relief she requests in the Motion to Compel at issue.

For the reasons stated, it is

ORDERED: *Debtor's Motion to Compel Chapter 13 Trustee to Conform Mortgage Distributions to Debtor's Plan and Make the Debtor Whole for Any Costs from Error in Distributions* (Doc. 142) is DENIED.

DONE and ORDERED on August 4, 2020.

A handwritten signature in black ink, appearing to read 'K. Specie', written over a horizontal line.

KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

Debtor's attorney is directed to serve a copy of this Order on interested parties and file a certificate of service within three (3) days of entry of this Order.